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IN THE

Supreme Court of the United States

October Term, 1952
No. 47

UNITED STATES OF AMERICA,
Appellant,

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, and CHARLES I. CONKLIN,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLEES

Opinion Below

The opinion of the Court below (R. 10-19), as modified by a subsequent order (R. 20), is reported at 102 F. Supp. 179 [1].

Jurisdiction

The order of the District Court dismissing 29 counts of the 32 count information was entered on January 15, 1952 (R. 10-19). The order denying appellant's motion

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[1] These modifications have been incorporated in the opinion set forth in the Record. The reported opinion, however, should be corrected so that the amount $270,000.00 reads $320,000.00, 102 F. Supp. 186.

for rehearing and modifying the original order was entered on March 10, 1952 (R. 20). Notice of appeal was filed on April 7, 1952 (R. 22-23), and probable jurisdiction noted on May 26, 1952 (R. 25).

The Government has taken its appeal under Criminal Appeals Act, 18 U. S. C. 3731 and Rule 37(a)(2), F. R. Crim. P. from both the above orders of the District Court.

Question Presented

Did the District Court correctly hold:

(a) that the criminal offenses which may be separately charged under the Fair Labor Standards Act are defined by Section 15, entitled "Prohibited Acts" (and not by Sections 6, 7 and 11(c) prescribing substantive standards of wage payments and record keeping); and,

(b) that accordingly, the prosecutor may not multiply the *three* offenses of below-minimum payments, overtime at less than the required rate, and improper records, specified in Section 15, by the *number* of individual employees affected *and* by the *number* of particular work-weeks involved, thereby alleging many more crimes than are proscribed by the statute, each punishable (Section 16) by $10,000 fine and 6 months' imprisonment.

Statute Involved

This appeal concerns a construction of the provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910). The relevant sections of the Act are set forth at pages 3-5 of the Government's brief.

Statement

The information charges the appellees with violation of Section 15(a), paragraphs (2) and (5), of the Fair Labor standards Act. A group of 18 employees at one branch of the corporate defendant are affected. During a period of two consecutive years spanning the full period of the statute of limitations, these employees allegedly did not receive their due under the Act and local office records covering them were inaccurate. While the information (summarized in the Appendix hereto) omits portions of this period and does not allege underpayments and improper records for each of the 18, it does not negate, and is consistent with, the supposition that the employees at this branch were underpaid and the records kept improperly, throughout this period, pursuant to a single unauthorized instruction of the local or branch management in Kansas City, Missouri. The time gaps in the information, evidently, were devised arbitrarily by the prosecutor and do not indicate that defendants engaged in repeated and different defiances of the statute. The District Judge construed the information in his Opinion (*passim*) as alleging a "course of conduct" of the defendants as distinguished from many independent acts.

Relying on his aforesaid artificial splitting of defendants' course of conduct, the prosecutor charged: separate offenses for *each* workweek in which underpayment was alleged; separate offenses for *each* employee allegedly underpaid; separate offenses for *each* employee covered by allegedly defective records; and separate offenses for *each* of several times arbitrarily delimited in the information for improper records. By this process of fragmentation, the information spelled out 32 crimes.

The District Court held, however, that the number of crimes into which the conduct complained of could be divided was limited by Sections 15 and 16(a), since these

are the sections which define the "prohibited acts" and prescribe the punishment. The Court decided that these sections permit the defendants' alleged conduct to be broken only into three units: (1) payments below the statutory minimum; (2) overtime payments at less than the required rate; and (3) improper records. Not finding any other criteria in these sections by which the alleged conduct could be sub-divided into further offenses, such as duration or employee—in contrast to Section 16(b) dealing with civil remedies—the learned judge consolidated the 32 counts into the 3 crimes authorized to be charged. The Court thus determined that the maximum fine which may be exacted under the statute for the course of conduct set forth in the information is $30,000 and not $320,000.

While the Government asserts that the practice has been to charge separate offenses under the Act, based on particular employees and particular workweeks, its brief (at p. 9, n. 5) acknowledges that there have been "exceptions". We are not told the number or proportion of the exceptions. In any event, as the Government concedes, the present is the first case to raise the question. The only judicial opinion on the point is the one below, deciding the matter in favor of the respondents. We submit that the legislative history and an analysis of the structure of the statute demonstrate the soundness of the District Court's conclusion.

Summary of Argument

It is undisputed that the statute must "in the plainest terms" spell out the separate offenses that may be charged. The legislative history of the Act shows that Congress expressly considered and rejected the two criteria—each employee affected and each workweek—upon which the Government relies. The original Bill explicitly defined underpayment to each employee as a separate offense and

further defined improper records as a separate offense for each workweek; but omitted each workweek from the definition of separate underpayment offenses and omitted each employee from the definition of separate record offenses. At successive legislative stages, in response to criticism against the harshness of allowing said multiple offenses to be charged, the clauses providing separate underpayment offenses for each employee affected and separate record offenses for each workweek involved, were deleted from the Bill. At the same time, to compensate for this reduction in the number of offenses, the maximum fine for each offense was raised from $500 to $10,000.

Moreover, analysis of the statute does not show any plain statement of the two criteria relied upon by the Government for defining penal offenses; rather the contrary. Section 16 which prescribes the civil and criminal liability uses the criteria urged by the Government in clause (b) dealing with civil liability but omits them from clause (a) which prescribes the criminal penalties. Section 15, which is expressly intended to define the "prohibited acts," also does not mention either criterion relied on by the Government, but sets up an entirely different classification of offenses based on generic standards of conduct. Sections 6, 7, and 11(c), stressed by the Government, do not purport to define what are separate criminal offenses. In addition Section 6 does not mention at all, and Section 7 does not plainly lay down, any workweek unit; while Section 11(c) does not mention either an employee unit or a time unit or any unit other than "records prescribed by the Administrator." The Government's arbitrary insertion of "each employee" and "each workweek" in Section 15 and Section 16(a) as units of separate criminal offenses would permit an unlimited multiplication of offenses at the prosecutor's discretion, a position which the Government's own brief is forced to disclaim.

The District Court properly viewed the information as alleging a course of conduct rather than separate defiances of the statute, the time gaps in the information reflecting the prosecutor's selection rather than the actual facts. But whether continuous or discrete, the conduct could be split only into the separate offenses defined by Congress. The legislative history and reasoned analysis of the statute both demnostrate that the charging of multiple criminal offenses based on *each* employee affected and *each* workweek involved, each subject to a $10,000 fine, are not authorized by the plain terms of Sections 15 and 16.

ARGUMENT

POINT I

The District Court correctly held that the definition of separate offenses by particular employees and particular workweeks must be spelled out by the statute "in the plainest terms."

The Government brief (at p. 11) concedes, as indeed it must, that the prosecutor is not free to pick the criteria by which to determine whether offenses are separate. "It was the unit fixed by Congress which determined the nature of the offense" (Govt. Br. at p. 26).

Moreover, in seeking to ascertain "the unit fixed by Congress," we are guided by the fundamental premise of the criminal law, referred to by the learned District Judge (R. 18):

> "Criminal statutes are to be strictly construed. There is no such thing as a constructive offense. To warrant punishment for the violation of a criminal statute, the statute must spell out the offense in the plainest terms *Fasulo* v. *United States*, 272 U. S. 620."

The Government, to prevail, must show, therefore, that Congress "in the plainest terms" fixed as the separate criminal "unit" each underpayment or improper record delimited *both* by the individual employee affected and by the particular workperiod. Neither the legislative history nor the plain terms of the sections defining the crimes supports the Government's position. The Government must therefore fail, without more. But we believe that the legislative history and the plain terms of the Act show, affirmatively, that Congress intentionally did not fix the separate criminal units in terms of particular employees or particular workweeks.

We discuss the legislative history, first; we then analyze the pertinent statutory provisions.

POINT II

Congress considered and expressly rejected the separation of offenses by particular employees and particular workweeks.

The Government, apparently embarrassed by the fact that the legislative history is wholly unfavorable to its contention, seeks to dispose of it in a cryptic footnote (at 21-22, n. 10) with the characterization that it is "so inconclusive that it does not aid in the solution of the problem." We are decidedly of the contrary view. To give this Court an opportunity adequately to review the legislative history, we shall first set it forth chronologically, reserving our comment thereon for a later section of this brief.[2]

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[2] In our citations of the legislative history, we have used the calendar date on which the various actions were taken, and not the legislative date.

A. The Legislative History.

Following President Roosevelt's message to Congress on May 24, 1937, in which he requested legislation to improve "the standard of living of those who are now undernourished, poorly clad and ill housed",[3] S. 2475 was introduced in the Senate by Senator Black, Chairman of the Committee on Education and Labor.[4] This bill, in amended form, became the Fair Labor Standards Act of 1938.[5]

As originally submitted, the relevant provisions of Section 27 of the Bill read as follows:

> "(a) Any person who willfully performs or aids or abets in the performance of any act declared to be unlawful by any provision of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $500 or imprisoned for not more than six months, or both. *Where the employment of an employee in violation of any provision of this Act or of a labor standard order is unlawful, each employee so employed in violation of such provision shall constitute a separate offense.*
>
> (b) Any employer who willfully fails to keep records required by this Act or any regulation or order thereunder or to furnish such records to the Board or any authorized representative of the Board upon request, and any person who willfully destroys (except after such time as may be prescribed under the regulations adopted pursuant to this Act) mutilates, alters, or by any means or device falsifies any

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[3] House Doc. No. 255, P. 4, 75th Congress, First Session.

[4] On the same day, Representative Connery, Chairman of the House Committee on Labor, introduced in the House H. R. 7200, which contained provisions identical to that of S. 2475.

[5] The House, in order to expedite the passage of legislation prescribing fair labor standards, shelved H. R. 7200 and acted upon S. 2475.

such record, shall be guilty of a misdemeanor and, upon conviction, shall be fined not more than $500 or imprisoned for not more than six months, or both, *and each week of such failure to keep the records required under this Act or to furnish same to the Board or any authorized representative of the Board shall constitute a separate offense.*" (Emphasis added.)

* * *

Thus, the original Bill defined as separate offenses, (a) underpayments to each employee but regardless of the number of workweeks, and (b) improper records for each workweek but regardless of the number of employees. The maximum fine for each offense was only $500.

The Bill was referred to the Committee on Education and Labor. Joint hearings by the Senate Committee on Education and Labor and the House Committee on Labor were held from June 2 to June 22, 1937. Over 1200 pages of testimony were taken.[6]

On July 8, 1937, Senator Black reported S. 2475 with an amendment.[7] The Bill as amended retained in Section 23 the quoted underlined language of the old Section 27(a) but deleted the quoted underlined language of the old Section 27(b).

On July 29, 1937, Senator Bridges offered a comprehensive amendment to S. 2475.[8] Among the provisions set forth in Senator Bridges' proposed amendment was one

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[6] Joint hearings before Committee on Education and Labor, United States Senate, and the Committee on Labor, House of Representatives, 75th Cong. 1st Sess. on S. 2475 and H. R. 7200, Bills to Provide for the Establishment of Fair Labor Standards in Employment in and Affecting Interstate Commerce, and For Other Purposes.

[7] 81 Cong. Rec. 6894 (1937).

[8] 81 Cong. Rec. 7790-1 (1937).

concerning penalties. The relevant portions of this Section read as follows:

> "Any person who willfully performs or aids or abets in the performance of any act declared to be unlawful by any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not more than $5,000 or imprisoned for not more than 1 year. * * *".

Senator Bridges also stated on the floor of the Senate in this connection:

> "The Black bill provides for a fine of $500 or imprisonment for each offense, and each person employed would constitute a separate offense, which would be a tremendous penalty to inflict and one that would ruin almost any industry or any business if applied. My amendment would provide a fine of $5,000 or imprisonment for 1 year, but each person hired would not constitute a separate offense."[9]

Although the Bridges amendment was rejected in its entirety,[10] it was to bear fruit later in the legislative process.

On July 31, 1937, S. 2475 passed the Senate in amended form.[11] The separate offense provision of the old 27(a) was retained as part of Section 23(a). On August 2, 1937, the Bill was referred to the House Labor Committee.[12] On August 6, 1937, the Bill was reported with amendments.[13] No change was made in Section 23(a). On August 20, 1937, Representative Taylor, in discussing on the floor

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[9] 81 Cong. Rec. 7792 (1937).
[10] 81 Cong. Rec. 7956 (1937).
[11] 81 Cong. Rec. 7957 (1937).
[12] 81 Cong. Rec. 8062-3 (1937).
[13] 81 Cong. Rec. 8478 (1937).

of the House the separate offense provisions of S. 2475, as originally drafted, stated: [14]

> "The punitive provisions of the original Black-Connery Bill are both interesting and amazing because they disclose the spirit which motivated the measure. The President is empowered through the board to punish a refractory employer, that is to say, if he does not obey the board's orders, by fines and imprisonment. The Bill provides that each person who is employed at lower wages or longer hours than that decreed by the board shall 'constitute a separate offense' punishable by a fine of not less than $500, or imprisonment for 6 months, or both. Therefore, if an employer pays to 100 persons lower wages than the board decrees, or works them over the hours designated, he may be sentenced to pay fines aggregating $50,000, and he may be sent to prison for a total of 50 years, or both. Under the language of this Bill a large employer, such as Henry Ford, might be sent to jail for the better part of eternity. * * *"

During the course of the debate various amendments were agreed to by the House and Section 23 was renumbered Section 22. On December 17, 1937, Representative Engel offered an amendment to Section 22(a), which struck the provision in that Section creating a separate offense as to each employee.[15] In discussing his amendment, Representative Engel stated: [16]

> "Mr. Chairman, there are 80,000 employees on the River Rouge payroll of the Ford Motor Company. If this section remains in the bill, Mr. Ford, the

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[14] 81 Cong. Rec. 9507 (1937).
[15] 82 Cong. Rec. 1828 (1937).
[16] 82 Cong. Rec. 1828 (1937).

> Ford Motor Co., and every employee who aids or abets in the failure to perform a duty or who omits to perform any act, duty or obligation, is subject to imprisonment for a term of 40,000 years and to a fine of $40,000,000."

The amendment of Representative Engel was then approved by the House.[17] The Bill was recommitted to the House Committee on Labor[18] and on April 21, 1938 was reported by the Committee with an amendment.[19] Section 14 of the Bill, as reported, contained the penalty provisions of the former Section 22; it provided:

> "Any person who violates any of the provisions of Section 13 shall upon conviction thereof be subject to a fine of not more than $500, or to imprisonment for not more than six months, or both.[20]"

The Bill, as thus amended, passed the House.[21] The Senate disagreed with the House amendments and asked

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[17] 82 Cong. Rec. 1829 (1937).

[18] 82 Cong. Rec. 1835 (1937).

[19] 83 Cong. Rec. 5680 (1938).

The Government, attempting to minimize the deliberate action taken by Congress in striking the separate offense provisions, states (brief, p. 23, n. 10) that when the Bill was reported out of Committee the Chairman described it as an "entirely different" Bill. A reading of the Record (83 Cong. Rec. 7279-7280 (1938)) will show that the Chairman of the House Committee on Labor in using the quoted language was describing the "philosophy of the bill" as reported with Committee amendments, i.e., that the Bill, as reported, created "a rigid floor on wages and a rigid ceiling on hours" rather than leaving these matters to the Administrator. The Bill was still S. 2475.

[20] Section 13 set forth "Prohibited Acts".

[21] 83 Cong. Rec. 7450 (1938).

for a conference.[22] The Conference Committee adopted, with one relevant change, the language of the House with respect to the separate offense and penalty provisions of the Act, *viz.* the fine was increased from $500 to $10,000.[23] The sections also were renumbered and Section 14 of the Bill, as reported, prescribing the penalties became Section 16 of the Bill. The Conference report was agreed to on June 14, 1938 by both the Senate and the House,[24] and the Bill was then approved by the President on June 25, 1938.[25]

B. This Legislative History Conclusively Shows the Elimination From the Statute of the Criteria Relied on by the Government.

Not even the original Bill supported the Government's present position. The Government would now break up into separate offenses *both* underpayments and record failures according to *both* number of employees and number of workweeks. Yet the original S. 2475 chose to sub-divide underpayment offenses according to number of employees only, and to sub-divide record offenses according to number of workweeks only. From the explicit formulation of the original Bill, it is clear that underpayment offenses were not to be sub-divided according to number of workweeks and record offenses were not to be sub-divided according to number of employees. Thus, the Government now contends for an even greater multiplicity of offenses than was allowed by the original Bill which was the legislative proposal most severe on offenders.

At subsequent stages, the Bill was progressively altered to permit the charging of *fewer* separate offenses. Thus:

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[22] 83 Cong. Rec. 7560 (1938).

[23] H. R. 2738, 75th Cong., 3d Sess. (1938).

[24] 83 Cong. Rec. 9178, 9267 (1938).

[25] 83 Cong. Rec. 9616.

1. The Bill as reported out of Committee by Chairman Black on July 6, 1937, deleted the clause permitting the separate charging of record-keeping offenses according to number of workweeks.

2. Then, on December 17, 1937, the House deleted the clause permitting the separate charging of underpayment offenses according to number of employees.

3. The Senate-House Conference reported the Bill which became law, with neither clause in it.

It is incontrovertible that the legislative attention had focussed on the proposed use of particular employees and of particular workweeks as criteria for separate offenses; because of the criticism that said multiplicity was unjustly harsh, the Congress completely rejected both criteria for defining separate offenses.

The legislative evolution of the maximum fine confirms this analysis. The original Bill, with the largest number of legislatively proposed offenses, provided a $500 maximum fine for each offense. Senator Bridges, it will be recalled, suggested deletion of the separate offense clause but thought that, in that event, the maximum fine ought to be increased. This was the solution adopted by the Conference Committee: while rejecting number of employees and number of workweeks as criteria making for an undue multiple respectively, of underpayment and record offenses, they raised the maximum fine for each of the offenses thus reduced in number, from $500 to $10,000.

The legislative history demonstrates the absurdity of the Government's position. It desires now to take this increased maximum fine—introduced into the Bill because the number of offenses allowed to be charged was being reduced by the legislature's rejection of "each employee" and "each workweek" as criminal units— and by using

these rejected criteria in compounded form, it seeks to apply the higher maximum fine not only to the multiplicity of offenses contemplated by the original Bill and successively curtailed in the legislative mill, but also to apply it to a greater multiplicity of offenses even than was allowed by the original Bill.

POINT III

Moreover, the District Court correctly held that the statute itself does not spell out "in the plainest terms" either "each employee" or "each workweek" as units of separate offenses.

The Fair Labor Standards Act is a lengthy statute dealing not only with criminal offenses, but also with administration and with civil and equitable remedies. Since the units of criminal offense must be spelled out by the statute and "in the plainest terms", surely this plain delineation of criteria should be found in the part of the statute that defines the penalty, or to borrow language from the Government's brief (at p. 28), "describes the offense." The separate offenses plainly defined by Congress must therefore be sought in Section 16, entitled "Penalties; civil and criminal liability" and in Section 15, entitled "Prohibited acts."

Section 16 has two sub-sections: (a) concerns criminal liability only, while (b) deals exclusively with civil liability. A comparison of the two sub-sections is instructive. Sub-section (a) defines the criminal liability of "any person who willfully violates any of the provisions of Section 15". Sub-section (a) does not so much as mention either of the criteria for separate offenses relied on by the Government: particular employees or particular workweeks. By contrast, sub-section (b) creating a civil remedy provides expressly that the civil action for the wage deficiency

and liquidated damages in an equal amount may be brought "by any one or more" of the employees affected.

Throughout its Brief (*e.g.*, at pp. 11, 13, 19, 23-24), the Government stresses the employer's duty to the individual employee as a reason for holding that the criminal offense of underpayment is multiplied by the number of employees underpaid. But this is arrant confusion of the criminal and civil liabilities respectively provided by (a) and (b) of Section 16. The explicit provision of this unit in specifying civil liability points up the meaningfulness of the complete omission of this criterion from the part defining criminal liability. Similarly, the explicit dependence of the amount of recoverable liquidated damages on the total amount by which wage payments were deficient, in sub-section (b), contrasts significantly with the complete omission from sub-section (a) of any reference to workweeks or other measures of amount of deficiency.

Section 16(a), as noted, makes it criminal to willfully violate "any of the provisions of Section 15". Section 15 is entitled "Prohibited acts" and, we submit, is the only section that spells out separate criminal offenses. The separate offenses are enumerated therein as follows: (1) shipments in commerce; (2) underpayments[26]; (3) discrimination against complainants; (4) child labor; (5) incorrect records and reports. The enumerated offenses do not speak in terms of each employee or each workweek. Since Congress has actually enumerated separate offenses in the section designed to define the "prohibited acts", there is no warrant for further sub-division by the prosecutor into additional, multiple offenses. Thus, for example, it would be fantastic to treat each of the acts mentioned in Section 15(1)—offer to transport, transportation, de-

[26] The District Court treated below-minimum payments and overtime at less than the required rate as separate offenses, evidently because these are specified disjunctively and concern different standards.

livery, sale, etc.—as separate offenses; taken together they constitute a single offense, namely, infraction of 15(1). The conduct alleged in the information falls within clauses (2) and (5) of Section 15; accordingly, we submit, only two (or at most three—see note 26) offenses by defendants have been plainly spelled out by the statute. Furthermore, the reasonable construction of Section 16 is that $10,000 is the maximum fine that may be imposed for "any" and all violations of Section 15, and thus, the total amount of the fines that may be imposed on a defendant for all violations of Section 15, when taken together, cannot exceed that amount.

Section 15 makes it "unlawful * * * (2) to violate any of the provisions of Section 6 or Section 7 * * * [and] (5) to violate any of the provisions of Section 11(c) * * *." Note that it does not say *each* act in violation of the sections referred to; the term "any" simply means 'all or some and at least one'; it does not convey the meaning of 'each taken separately'. Section 15 certainly does not, "in the plainest terms" spell out separate offenses based on the number of employees and the number of workweeks affected; it does not even mention these or refer to "each employee" or "each workweek".

The Government's heavy reliance on Sections 6, 7 and 11(c) is misplaced. In the first instance these sections do not deal with the definition of separate criminal offenses but with the substantive requirements common to the field of federal wage regulation including administration and civil remedies. They lay down standards for determining what conduct is made unlawful by Section 15(2) and (5); they do not, however, purport to provide the measure of what are separate offenses. Put another way, one cannot tell whether any crime at all has been alleged in the information under Section 15(2) or (5) except by reference to Sections 6, 7 and 11(c). But it is a *non-sequitur* to infer from this, as the Government evidently does, that

Sections (6), (7) and 11(c) also lay down the criteria for separate offenses. Thus, in *Re Snow*, 120 U. S. 274, plural cohabitation for one week completed the offense; it did not follow that each subsequent week's plural cohabitation constituted a separate offense. Practicing dentistry for one week without a license constitutes a crime; it does not follow that each week thereafter in which dentistry is practiced without a license constitutes an additional offense (see cases in Govt. Br. at p. 26).

As the Government concedes, the statute must define the crime. This involves two different requirements: (a) the statute must spell out whether any crime at all has been completed and (b) if more than one crime is to be charged, it must spell out what are the separate offenses. The *Snow* case and the business cases cited in the Government's brief demonstrate that a solution of problem (a) does not give a solution of problem (b). Sections 6, 7 and 11(c) can tell us whether any crime at all has been alleged under 15(2) and (5), but not how many.

Moreover, contrary to the Government's contention (at pp. 30-32), Sections 6, 7 and 11(c) do not clearly set forth "each employee" and "each workweek" as "precise" separate units. The Government concedes immediately (at p. 31) that Section 6, minimum wages, "does not fix explicitly the time unit"; this concession is itself fatal to the Government's position in view of the basic proposition not disputed by the Government that the statute must state the separate offenses "in the plainest terms". To give the Administrator a choice between "hours" and "workweek", as the Government argues (at pp. 31-32) was done by Section 6, is to let the prosecutor decide how many offenses to charge, a power the Government Brief elsewhere (at p. 24) disclaims.

Section 7 requires the payment of time and one half the "regular" rate for the "hours" worked over forty, so

that this section, too, does not unequivocally use workweek as against hours.

Section 11(c), records, is even less precise as to any unit. It does not mention "each employee". Neither does it refer to workweek. It requires such records as the Administrator shall prescribe by regulation, but is wholly silent on any time unit or on the Administrator's authority to define a time unit. If the Administrator may choose a workweek as the time unit for records, why not the hour or smaller unit and why not other units such as minimum wage records, overtime records, etc.? We have here, inherent in the Government's position, the very flowering of multiple offenses in the prosecutor's sole discretion, which the Government's own brief repudiates.

We may note, further, that "workweek' is in itself not a precise unit. *Tennessee Coal Co.* v. *Muscoda Local,* 321 U. S. 590. Suppose that the production policies of a given company might require the use of several different workweeks, whereas its competitor may only use one for all its employees. In the event that both companies fail to pay overtime, the former could be charged with a greater number of crimes, notwithstanding the fact that culpability in both cases is the same.

Thus Sections 6, 7 and 11(c) do not purport to define separate prohibited acts as this enumeration is left to another section, namely 15(a)(1) through (5). Furthermore, even they do not set forth precise employee and time units. On the contrary, Section 6 would permit the Administrator to multiply the already numerous minimum wage offenses asserted on a workweek theory by another 40. Section 7 would permit the same multiplication for the numerous overtime offenses; and Section 11(c) would permit as many more multiplications of record offenses to the extent that the Administrator cared to select minuter time or other units. These myriad offenses would then *each* be subject to a $10,000 fine (and 6 months' prison for offenses

after a conviction). The Government's position inevitably leads to the fantastic result which the legislative history shows was expressly rejected by Congress and which must be rejected by any reasoned analysis of the statute. *United States* v. *Brown*, 333 U. S. 18.

The Fair Labor Standards Act was enacted against the backdrop of the economic depression of the 1930's. It is unnecessary to recite here the conditions which caused the many failures and bankruptcies in business, *West Coast Hotel Co.* v. *Parish*, 300 U. S. 379, 399, and it is contrary to common sense and to the legislative history to assume that Congress intended by Sections 15 and 16 of the Act to provide for the imposition of penalties which no business could withstand.

To quote from the Government's brief (at p. 24):

> "If the prosecutor is allowed to create bases of his own devising for splitting a single offense into many offenses, he is enabled to render a crime infinitely divisible into smaller and more numerous offenses, and he is thereby enabled to ignore the statutory limits with respect to the amount of penalty."

The "statutory limits" of Sections 15 and 16(a) are ignored as a result of the Government's reading into said sections variable employee and time criteria.

Finally, the Government's Brief seems to argue (at pp. 22-23 and 36, n. 17) that the offenses must be separate unless there is a course of conduct. But this argument is defective on two grounds. In the first place, as already noted above, the District Court viewed the information as alleging a course of conduct. The prosecutor's arbitrarily skipping workweeks in the allegations does not show that this view was in error. The alleged violations could all have stemmed from a single unauthorized direction of the local manager, intent on establishing an impressive record

for the home office, to have employees work overtime without recording it. In any event the District Court's construction of the information as alleging a course of conduct is not before this Court on this appeal. *United States* v. *Borden Co.*, 308 U. S. 188, 194; *United States* v. *Carbone*, 327 U. S. 633, 641. The Government in exercising the exceptional right of appeal provided by the Criminal Appeals Act (18 U. S. C. 3731) is strictly limited to the instances specified, namely the construction of the statute and not the correctness of the District Court's characterization of the allegations of the information.

Secondly, as the Government's Brief recognizes (at p. 35), even if the conduct is not continuous it was for Congress to define the number of offenses.

The Government has failed in its burden of showing that Congress, in Sections 15 and 16, specified "in the plainest terms" particular employees and particular workweeks as criteria for charging separate crimes. The legislative history and analysis of the statute clearly show the contrary.

CONCLUSION

For the reasons stated above the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

The information can be schematically set forth as follows:

FAILURE TO PAY MINIMUN WAGES

Count		*Workweek Ending*	*Defendants*
I	Mary Ellen Way	May 26, 1950	Univ. C. I. T., Neal, Conklin
II	Josephine Kellerman	May 13, 1950	" " "
III	Josephine Kellerman	May 20, 1950	" " "
IV	Mary Ellen Way	October 7, 1950	Univ. C. I. T., Neal, Wolfe
V	Norma J. Smith	October 14, 1950	" " "
VI	Norma J. Smith	December 9, 1950	" " "

FAILURE TO PAY OVERTIME

VII	Charles A. Wynn	December 18, 1948	Univ. C. I. T., Neal, Conklin
VIII	William R. Cadwell	January 8, 1949	" " "
IX	Richard A. Griffiths	April 9, 1949	" " "
X	David H. Chapman	May 7, 1949	" " "
XI	William J. McDonald	July 23, 1949	" " "
XII	William J. McDonald	October 15, 1949	" " "
XIII	William R. Cadwell	February 4, 1950	" " "

Count		*Workweek Ending*	*Defendants*
XIV	North W. Lientz	February 11, 1950	Univ. C. I. T., Neal, Conklin
XV	North W. Lientz	March 11, 1950	" " "
XVI	David H. Chapman	April 22, 1950	" " "
XVII	Richard A. Griffiths	May 13, 1950	" " "
XVIII	John E. Ennis	July 8, 1950	Univ. C. I. T., Neal, Wolfe
XIX	Beulah Lear	July 22, 1950	" " "
XX	Beulah Lear	August 12, 1950	" " "
XXI	Barbara E. Liebst	September 2, 1950	" " "
XXII	Barbara E. Liebst	October 7, 1950	" " "
XXIII	Mary L. Winger	November 4, 1950	" " "
XXIV	John E. Ennis	December 9, 1950	" " "
XXV	Dorothy J. Luther	December 16, 1950	" " "
XXVI	Dorothy J. Luther	December 23, 1950	" " "
		FAILURE TO KEEP RECORDS	
XXVII	James R. Granger	April 10-May 27, 1950	Univ. C. I. T., Neal, Conklin
XXVIII	Harry J. McNamara, Jr.	April 10-May 27, 1950	" " "
XXIX	James R. Granger	June 5-December 16, 1950	Univ. C. I. T., Neal, Wolfe
XXX	Harry J. McNamara, Jr.	June 5-December 16, 1950	" " "
XXXI	Virginia Kitch	July 17-November 18, 1950	" " "
XXII	Phyllis A. Weber	July 3-December 30, 1950	" " "

Counts I-VI (R. 1-2) each charge the willful failure to pay wages at the statutory rate of seventy-five cents an hour to a particular employee during a specified workweek. Although each count describes a different workweek, the workweeks of Counts I, II and III are successive, as are the workweeks of Counts IV and V. Counts II and III in addition to describing successive workweeks, name the same employee.

Counts VII-XXVI (R. 2-6) each charge the willful failure to pay to a particular employee during a specified workweek the statutory overtime compensation of one and one-half times the regular rate of pay for hours worked in excess of forty. Counts XIII and XIV describe successive workweeks, as do Counts XXIV-XXVI. Counts XXV and XXVI, in addition to describing successive workweeks, name the same employee.

Counts XXVII-XXXII (R. 6-8) each charge the willful falsification of the work records of a particular employee; and each count identifies the period of time during which the alleged violation occurred. The same 48 days are used in Counts XXVII and XXVIII, and the same 195 days are used in Counts XXIX and XXX. The employee named in Count XXVII is also named in Count XXIX, and the employee named in Count XXVIII is named in Count XXX. Counts XXXI and XXXII concern different employees and cover periods of 125 and 181 days, respectively.